No. 76-718

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL A.S. MAKRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A) is reported at 483 F. 2d 1082, and its opinion on remand (Pet. App. C) is reported at 535 F. 2d 899. The opinion of the district court (Pet. App. B) is reported at 398 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1976. A petition for rehearing was denied on September 22, 1976. On October 14, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to November 21, 1976 (a Sunday), and the petition was filed on November 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, any error in the district court's failure to afford petitioner a pre-trial competency hearing pursuant to 18 U.S.C. 4244 was cured by its holding a post-trial hearing to determine petitioner's competency at the time of trial.

2. Whether the district court gave sufficient weight to expert medical testimony in finding that petitioner had been competent to stand trial.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts of perjury before the Securities and Exchange Commission, in violation of 18 U.S.C. 1621. He was given consecutive sentences of four years' imprisonment on the first two counts and was placed on probation for five years on the third. On appeal, the court of appeals reversed petitioner's conviction on the first count for insufficiency of the evidence. The case was remanded to the district court on the other two counts for a determination of whether a meaningful hearing on petitioner's competency to stand trial *nunc pro tunc* could be conducted and, if so, whether petitioner had been competent to stand trial (Pet. App. 1a-6a). After a hearing, the district court determined both questions adversely to petitioner (Pet. App. 1b-24b). The court of appeals affirmed (Pet. App. 1c-20c).

1. The evidence at trial may be briefly summarized as follows: In December 1970 petitioner testified before the Securities and Exchange Commission concerning a securities transaction involving two companies under investigation. The Commission's inquiry included allegations that petitioner and Frank Sharp had offered a share in a

Swiss trust containing $200 million in blue-chip securities to a Jesuit order in return for the seed money necessary to purchase the securities. Petitioner testified falsely at the Commission hearing concerning financial conversations he had had with the Jesuit order and his familiarity with a petroleum company whose securities were involved. 483 F. 2d 1084, 1088.

2. In April 1970, approximately eight months before his false testimony and over two years before trial, petitioner underwent brain surgery for the removal of a pituitary adenoma, a type of surgery that often affects behavior, personality and mental condition. Prior to trial, the district court appointed a psychiatrist, Dr. Alfred Vogt, to examine petitioner pursuant to 18 U.S.C. 4244 and to report on his competency to understand the proceedings against him and to assist in his defense, as well as on his mental condition at the time of the offense. In his report to the court and in testimony offered at a pre-trial hearing on petitioner's motion to suppress his testimony before the Commission, Dr. Vogt stated that, in his opinion, the brain surgery had made it impossible for petitioner to control his behavior in stressful situations. Despite these conclusions, the trial judge found that the evidence did not indicate a state of present insanity or mental incompetency, within the meaning of Section 4244, and it therefore did not hold a pre-trial hearing on petitioner's competency to stand trial.

On petitioner's first appeal, the court of appeals disagreed with the district court, concluding that since the psychiatrist's "report as a whole indicated a substantial possibility that [petitioner] was then incapable 'properly to assist in his own defense, . . .' under the mandatory provisions of §4244 the court should have held a hearing specifically on the issue of the ability of [petitioner] to assist

his counsel prior to the beginning of trial" (Pet. App. 3a-4a). The court observed, however, that "[o]nly if [petitioner] was, in fact, incompetent at the time of trial could a failure to hold the hearing required by 18 U.S.C. §4244 be an error which affected his substantive rights" (*id.* at 4a). It therefore remanded for a determination of whether an adequate and meaningful hearing for the purpose of determining *nunc pro tunc* petitioner's competency to stand trial in June 1972 could be held and, if so, whether petitioner had been competent at that time (*id.* at 5a-6a).[1]

3. At the remand hearing, the testimony of a number of lay witnesses who had had an opportunity to observe petitioner closely during the entire period from just prior to surgery until well after the trial established that petitioner was a highly intelligent and shrewd individual who, although handicapped, was not debilitated by his illness or incompetent to handle his affairs (Pet. App. 11b-15b). The expert medical testimony, however, was less conclusive. Dr. Vogt, who had examined petitioner prior to trial, testified that petitioner could understand the nature of the proceedings against him, but he was not certain that petitioner was able to cooperate with his counsel. Doctors from the Medical Center for Federal Prisoners at Springfield, Missouri, who had examined petitioner in December 1974, testified that petitioner was then competent to stand trial, but they did not voice any opinion as to his status in 1972. On the other hand, psychiatrists from the Menninger Clinic, who also had examined petitioner in 1974, indicated a belief that he had not been competent to stand trial in 1972. In addition, there was evidence that petitioner had learned to handle stressful situations by

[1]Petitioner sought review of the court of appeals' judgment, but this Court denied certiorari. 415 U.S. 914.

withdrawing, taking medicine, resting briefly, and drinking coffee with sugar in it. Finally, there was a general consensus of expert opinion that petitioner was capable of functioning normally in non-stress situations and that a person's ability to sustain stress despite pituitary gland surgery varied from individual to individual (*id.* at 16b-18b).

On the basis of this evidence, the district court concluded that petitioner had been competent to stand trial in June 1972. The court noted that it had had the opportunity to observe petitioner first-hand during the trial (in which it had acted as finder of fact) and it recalled that on several occasions when petitioner apparently had been overcome by stress, he had left the courtroom for short periods of time, which indicated that petitioner had "utiliz[ed] the techniques that he had acquired to compensate for this disability" (Pet. App. 21b). The court also noted that petitioner had conferred with counsel during trial and had responded rationally when questioned and that he had "displayed during the trial as well as at sentencing none of the physical manifestations indicative of his inability to cope with a stressful situation" (*ibid.*). The court's determination that petitioner had been capable of understanding the proceedings against him and of assisting his defense in June 1972 was based primarily on the "composite testimony of lay witnesses" rather than on the conclusions of the medical experts, which it found to be "conflicting and inconclusive" (*id.* at 18b-19b) and totally at odds with the observed conduct of petitioner by his business associates and by the court (*id.* at 20b-22b).

4. The court of appeals affirmed in a comprehensive opinion on which we substantially rely (Pet. App. 1c-20c). The court agreed that a meaningful *nunc pro tunc* determination of petitioner's competency could be made, observing that "the district court did not suffer from any lack

of available data" (*id.* at 10c), and it concluded, after a thorough review of the evidence, that the lower court's finding that petitioner had been competent to stand trial was sound (*id.* at 19c).

ARGUMENT

1. Petitioner's principal claim (Pet. 8-14) is that the court of appeals erroneously concluded that, in the circumstances of this case, the failure to hold a pre-trial competency hearing could be cured by a *nunc pro tunc* determination of competency after trial. In petitioner's view, whenever the district court neglects to hold a competency hearing required by 18 U.S.C. 4244 before trial, the conviction must be vacated and the defendant accorded a new trial, regardless of the feasibility of making a knowledgeable *nunc pro tunc* determination. This contention, we submit, finds support neither in the provisions of Section 4244, which do not suggest that the failure to hold a pre-trial competency hearing may never be remedied after trial, nor in common sense, since it would result in the reversal of convictions in cases where a defendant's substantive rights were not violated and the outcome of his trial was unaffected by the error. Moreover, contrary to petitioner's assertions, the holding of the court of appeals does not conflict with the decisions of this Court or of other circuits.

It is important to note at the outset that, unlike *Drope* v. *Missouri*, 420 U.S. 162, or *Pate* v. *Robinson*, 383 U.S. 375, this is not a case in which the defendant's competency to stand trial was ignored by the district court prior to trial. Nor is this case like *Dusky* v. *United States*, 362 U.S. 402, where although there had been a psychiatric examination and a hearing held to determine the defendant's competence, the evidence adduced was insufficient to "support the findings of competency to stand trial." *Ibid.* To the contrary, as we have already mentioned, petitioner's

mental state was a major concern at the time of trial: the district court ordered a pre-trial examination of petitioner by a psychiatrist, made a finding of competency after examining the expert's report, and held a pre-trial hearing on the issue of petitioner's competency at the time he testified before the Commission.

Thus, rather than engaging in a wholesale disregard of the relevant statutory provisions, the district court's only error here was its factual determination that the psychiatrist's report did not "indicate[] a state of present insanity or such mental incompetency in the accused" as to require a hearing on his ability to stand trial. In these circumstances, the court of appeals correctly concluded that petitioner's conviction need not be vacated unless, on remand, the district court was unable to make a meaningful and adequate *nunc pro tunc* competency determination. The court reasoned that, if the available evidence on remand allowed the trial judge to reach an informed conclusion about petitioner's competency in June 1972, this post-trial determination would be an adequate substitute for a pre-trial hearing, and any error in the court's failure precisely to follow the procedures outlined in Section 4244 would be harmless.

The court of appeals' holding that Section 4244 does not mandate a blanket prohibition of retrospective determinations of competency is not inconsistent with *Drope*, *Pate* or *Dusky*, each of which rejected a *nunc pro tunc* competency hearing on the basis of the particular facts of that case. Indeed, the Court's repeated observations that such determinations are inherently difficult (see *Pate* v. *Robinson*, *supra*, 383 U.S. at 387; *Drope* v. *Missouri*, *supra*, 420 U.S. at 183)—rather than impossible—strongly suggest that, in an appropriate case, the procedure followed by the courts below would be proper.

Similarly, the court of appeals' decision does not conflict with those of other circuits, several of which have held that the failure of the trial court to order a competency hearing prior to trial does not necessarily result in the vacation of the conviction and may be cured by a *nunc pro tunc* determination of competency if there is sufficient evidence in the record to make an accurate assessment possible. See *United States* v. *DiGilio*, 538 F. 2d 972, 989 (C.A. 3); *Rose* v. *United States*, 513 F. 2d 1251, 1257 (C.A. 8); *Tanner* v. *United States*, 434 F. 2d 260, 262 (C.A. 10), certiorari denied, 402 U.S. 912; *Conner* v. *Wingo*, 429 F. 2d 630, 639-640 (C.A. 6).[2]

Although petitioner contends (Pet. 8 n. 6, 10) that the Ninth and District of Columbia Circuits have ruled that the failure to hold a competency hearing prior to trial "cannot be remedied *nunc pro tunc*, but instead can only be corrected by vacating the judgment and ordering a new trial if the defendant is presently competent," this is incorrect. The Ninth Circuit, sitting *en banc*, has recently concluded that, despite "the difficulties inherent in *nunc pro tunc* hearings held for this purpose, we do not believe that they

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[2]Petitioner attempts to distinguish these and other cases by suggesting that many of them involved collateral, rather than direct, attacks on a conviction (Pet. 11-13). Since petitioner recognizes, however, that the conviction of an accused while he is mentally incompetent would violate the Fifth and Sixth Amendments and would be subject to collateral attack (Pet. 12, n. 8), the relevance of this distinction is far from apparent. Whatever the form of the proceeding in which the issue is raised, the crucial question remains the same: was the defendant competent at the time of his trial. The decision in a particular case whether a meaningful determination of this factual question may be made *nunc pro tunc* cannot be dependent upon whether the case is a direct or collateral attack. Indeed, there should be less hesitation to attempt a *nunc pro tunc* hearing in the context of a direct appeal, since the post-trial time delay in such cases is likely to be less than in a collateral attack.

are necessarily unmanageable * * *. The threshold question is whether the circumstances surrounding the case permit a fair retrospective determination of the defendant's competency at the time of trial." *de Kaplany* v. *Enomoto*, 540 F. 2d 975, 986, n.11, certiorari denied, No. 76-5496, January 25, 1977. By the same token, while the District of Columbia Circuit has suggested in a number of cases that *nunc pro tunc* determinations of competency are rarely possible, its rejection of such procedures in particular cases has depended upon the facts of those cases (see, *e.g.*, *Holloway* v. *United States*, 343 F. 2d 265, 267 (opinion of the court), 269 (Wright, J., concurring)), and it has expressly sanctioned that result in a proper setting. See *Gunther* v. *United States*, 215 F. 2d 493, 497.

In sum, we do not disagree with the view that a *nunc pro tunc* competency determination is an inherently difficult one, to be attempted only in the rare case in which the contemporaneous record is sufficiently clear. But the court of appeals did not contest this proposition, acknowledging that a "concurrent determination is indisputably the preferred method for insuring an accurate assessment of [an accused's] mental status" and that retrospective competency hearings are appropriate only "where there is sufficient data available to guarantee reliability" (Pet. App. 9c). The court therefore expressly instructed the trial judge to determine petitioner's competency on remand only if a reliable and intelligent finding could be made and to grant a new trial if an adequate competency determination was not possible. The district court's detailed finding that there was sufficient reliable evidence of petitioner's competence to stand trial in June 1972 is correct and does not warrant further review.

2. Petitioner also contends (Pet. 14) that the district court erred in failing to give "overriding weight" to certain expert medical testimony bearing on his competency to stand trial.

"Like criminal responsibility," however, "incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority." Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967). Contrary to petitioner's contentions, the trial judge did not fail to consider the expert testimony in this case, and that testimony was not "unimpeached and uncontradicted" (Pet. 14). The court thoroughly analyzed the medical opinions and found them to be "conflicting and inconclusive" (Pet. App. 18b), unreliable for a number of reaons,[3] and entitled to little weight when measured against the extensive lay testimony and the judge's personal observations, which "eliminate[d] any reasonable doubt as to the competency of the [petitioner] prior to and at the time of his trial in June, 1972" (*id.* at 19b).[4] As the court of appeals correctly observed (Pet. App.18c):

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[3]Specifically, the court refused to credit the conclusions of the Menninger psychiatrists because they knew nothing of petitioner's history other than what they had been told by petitioner and his wife and because they had never been informed that they would be called upon to make a legal assessment of petitioner's competency. These medical experts believed that petitioner had come to the Menninger Clinic to learn to cope with his condition, and thus they were "not primarily concerned with his capacity to comprehend and assist counsel at the time of trial" (Pet. App. 18b). Other medical testimony supporting a finding of incompetency was found unconvincing because it suggested that petitioner's condition could incapacitate him at trial but would not substantially impair his ability to function in a complex business environment. As the court noted, "[t]he practical convenience of such a malady cannot be overestimated" (*id.* at 21b).

[4]The court of appeals agreed that the lay testimony was "overwhelming," presenting a "sequential picture of [petitioner] as a shrewd businessman who, though handicapped, was not debilitated by his physical illness" (Pet. App. 18c-19c).

United States v. *Gray*, 421 F. 2d 316 (C.A. 5), does not conflict with this decision. In that case, the court determined that

> It is well settled that expert opinion is not binding on the trier of fact if there is reason to discount it. *Mims* v. *United States*, 375 F. 2d 135 (C.A. 5). Especially where the medical expert applies legal standards to arrive at a competency conclusion, he is performing a task at which only a judge is truly an expert. In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions of impaired ability are credited, the judge must still independently decide if the particular defendant was legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
JOHN H. BURNES, JR.,
Attorneys.

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the lay testimony was insufficient to rebut unanimous contrary medical evidence because none of the lay witnesses had ever had "prolonged and intimate contact with the accused." *Id.* at 318. Here, by contrast, the lay testimony "consisted of more than mere declarations that the [petitioner] appeared normal to his friends and associates" (Pet. App. 19c).

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